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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

H. F. ALLEN ORCHARDS, et al., ELBERT B. SCHINMANN, et al.,
R. E. REDMAN & SONS, INC.,
*Petitioners,*

VS.

THE UNITED STATES,
*Respondent.*

## REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The United States, in its Opposition to the Petition for Writ of Certiorari ("Opposition"), argues fervently that it should not be legally responsible for precipitation forecasts that go astray.

The Opposition should be set aside for future use in a case that raises the issues it attempts to rebut. *This is not such a case.*[1]

As is clear from the pleadings and the various documents filed with the court below in this Petition for Writ of Certiorari, the Bureau of Reclamation ("the Bureau") simply incorrectly computed the extant water it had available in early 1977 in the various reservoirs of the Yakima Project.[2]

When the Superintendent of the Yakima Office of the Bureau, William Gray, made his front-page admission, "We blew it," he was not referring to weather forecasting.

> "There was water in the system that we didn't know we had . . ." F.C. App. VI, p. 1003.

The shocking differential between the water that the Bureau announced would be available in early 1977, and the water that proved to be available, was not caused by either faulty weather forecasting or by an unpredictably heavy rainfall after the February 1977 computation.[3]

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[1] The underlying premise of the government's position, that if it can succeed in convincing the court that this is a weather forecasting case, it will have no liability, is not correct. Whether the government is liable for damage caused by negligence in forecasting depends upon the particular facts and context of the prediction. See, e.g. *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2nd Cir. 1967), in which the United States was forced to bear the consequences of an incorrect forecast. The present case, however, *is not a forecasting case.*

[2] It is obvious from the record that the Bureau did not correctly measure the snowpack in the Yakima Valley watershed either.

[3] As demonstrated by Table 3 in the Vissia Report (page A-65 in Appendix to Petition for Writ of Certiorari), the aggregate rainfall at five project stations from February through May 1977, was 52.21 inches,

In its focus on a non-issue, weather forecasting, the United State perpetuates the error of the courts below, and mischaracterizes the case. The case deserves to be analyzed on its actual facts, under the theories actually urged by the farmers and under the law that controls those theories, and not under hypothesized facts and law. Before this case can be properly decided, it must be fairly characterized. To characterize it as a case centering on weather forecasting serves neither the task of this Court nor the interests of justice.

On page 5 of its Opposition, the United States treats its announcements of the water that would be available to the farmers as of no more consequence than an estimate by a third party, or the farmers themselves. This argument is enormously distortive. The early 1977 announcements of the water that would be available were qualitatively different than anything which could have come from the farmers or a third party. The Bureau, which *controlled* the water, was telling the farmers how much water would be available to them. The Bureau was not saying to the farmers: "In our disinterested estimation, it appears to us that there will be X amount of water available to you this summer." Rather, the Bureau was saying to the farmers: "This is how much of your water we are going to release to you this summer under our contractual obligations."

This difference is, needless to say, crucial. The farmers' response was prudent. Indeed, had they ignored these announcements, they would have done so at their peril, and risked worse damage than they actually suffered.

The United States, in its Opposition, made no effort to rebut most of the farmers' points, including (1) their need for early information as to water available, (2) the basic errors in premise and computation made by the Bureau, and (3) the fact that unless the Bureau is held to a reasonable standard of performance in its early-season announcements, the contracts are essentially illusory and meaningless in short-water years.

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as compared to a normal aggregate for the same five stations of 69.81 inches.

This case involves unsettled questions of law, and a Court of Appeals opinion that deviates from clear guidelines laid down by this Court in a series of reclamation cases which have defined the various rights and obligations of the water users, the districts, and the Bureau. It has brought chaos into law that was well settled, and upon which those involved in the reclamation process relied and acted.

It is respectfully urged that under the criteria that govern this Court's acceptance of cases, this is an appropriate case for this Court's intervention. There are unanswered questions that need definition. Stability in the law and in the Bureau-district-farmer relationship, severly harmed by the opinions below, needs to be restored. Justice needs to be extended to hundreds of farmers in the Yakima Valley who had no option but to rely on the Bureau, and who reasonably relied upon the Bureau to their damage.

Dated: August 8, 1985.

Respectfully submitted,

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